Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

ROBERT MIMS,

Petitioner,

v.

DAVID CRIST, WARDEN; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JAMES E. MCCOLLUM, JR.
CARLA M. MATHERS
JAMES E. MCCOLLUM, JR.
& ASSOCIATES, P.C.
7309 Baltimore Ave.
Suite 117
College Park, MD 20740
(301) 864-6070

WILLIAM H. MURPHY, JR.
Counsel of Record
12 West Madison Street
Baltimore, MD 21201
(410) 539-6500

Counsel for Petitioner

181016

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

(1) Whether the trial court's decision to preclude witness testimony concerning the suggestive nature of the identifications and their circumstances unconstitutionally denied Petitioner his due process right to a fundamentally fair trial?

(2) Whether the trial court unconstitutionally conditioned the admission of a critical government witness' mis-identification of Petitioner on the admission of the witness' later suggestive identification?

(3) Whether the Petitioner's constitutional rights were violated when the court permitted the prosecutor to tell the jury that the witness' mis-identification was due to a defense strategy to stack the line up with "clones" of Petitioner?

(4) Whether the prosecutor's misconduct during the course of the trial, which created a racially-charged atmosphere, violated Petitioner's due process rights?

(5) Whether Petitioner's counsel failure to object to the prosecutor's misconduct and the court's excessive judicial activism constituted ineffective assistance of counsel in violation of Petitioner's constitutional rights?

LIST OF PARTIES

Petitioner is Robert Mims, appellant below. Respondents are David Crist, Warden; the District Attorney of the County of Philadelphia; and the Attorney General of the State of Pennsylvania.

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Robert Mims ("Mr. Mims"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The March 5, 2003, Order denying Petitioner's Petition for Rehearing *en banc* was unreported and is reproduced in Appendix D. Petitioner's request for a certificate of appealability was denied by United States Court of Appeals for the Third Circuit on November 22, 2002, and is reproduced in Appendix A. Petitioner's Petition for Writ of Habeas Corpus was denied, and the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi was approved and adopted by the United States District Court for the Eastern District of Pennsylvania on July 26, 2001. The Order is reproduced in Appendix B. Finally, United States Magistrate Judge Peter B. Scuderi's Report and Recommendation to Deny Petition for Writ of Habeas Corpus filed April 16, 2001, is reproduced in Appendix C.

STATEMENT OF JURISDICTION

This is an appeal from the denial of a petition for a certificate of appealability of the United States Courts of Appeal for the Third Circuit under 28 U.S.C. § 2253. Petitioner applied for the certificate of appealability in order to appeal a final District Court order denying habeas corpus relief with respect to his state conviction. This Court has jurisdiction over this petition pursuant to 28 U.S.C. §§ 1254(1), 2241 and 2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the XIV Amendment to the United States Constitution provides:

> [a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

> of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment XIV.

Amendment V to the United States Constitution reads, in pertinent part,

> [n]o person . . . shall be de . . . deprived of life, liberty, or property, without due process of law. . . .

United States Constitutions, Amendment V.

Amendment VI to the United States Constitution reads, in pertinent part,

> [i]n all criminal prosecutors, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitutions, Amendment VI.

STATEMENT OF THE CASE

A. Introduction and Summary

On January 4, 1971, eight African-American men entered Dubrow's furniture store in Philadelphia, committed robbery and arson, and killed one man. The murder victim was African-American, and all of the remaining of the witnesses were white. Two days after the incident, two witnesses — Louis Gruby and Audrey DiMeo — allegedly identified a photograph of Petitioner, an African-American man, in a police photo array; the alleged identification occurred without defense counsel, and

the photo array was never produced at trial. The remaining ten witnesses never identified Petitioner in any way.

The only evidence linking Petitioner to this crime was the two witnesses' alleged photo array identification and their deeply flawed in-court identifications, discussed below. Petitioner had never met the victim and had no relationship to the furniture store. There was no hair or fiber evidence, no fingerprints or DNA, no telephone records or wiretaps, no security cameras or videotapes, no confession, no testimony by a coconspirator, no stolen property found in Petitioner's possession, and no allegations of Petitioner's involvement by an informant. In fact, Petitioner produced alibi evidence that he had moved to Chicago and was living there at the time the crime was committed.

Petitioner has always maintained his innocence.

Petitioner was convicted in April 1975 in a jury trial. On appeal, the conviction was reversed by the Pennsylvania Supreme Court based upon trial counsel's ineffective assistance. Petitioner was retried in 1981 with a codefendant, Edward Sistrunk. On November 19, 1981, Petitioner and his codefendant were convicted. Petitioner appealed to the Superior Court and the appeal was denied on December 14, 1984. On September 30, 1985, Petitioner's appeal to the Pennsylvania Supreme Court was denied. On January 11, 1996, Petitioner filed his first counseled post-conviction petition. After a hearing, the court denied relief without issuing an opinion.

The Pennsylvania Superior Court denied Petitioner's appeal of the denial of post-conviction relief on January 25, 1999. On September 23, 1999, the Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal. Petitioner filed his federal habeas petition on May 22, 2000. A Magistrate Judge issued findings and recommendations that were adopted by the District Judge. Petitioner then applied to the United States Court of Appeals for the Third Circuit, which denied his application for a certificate of appealability. Thereafter, the Petitioner applied

for a rehearing *en banc* to the United States Court of Appeals for the Third Circuit. That petition also was denied.

B. The First Trial

Mr. Mims was tried before a jury in April, 1975. The sole issue at trial was identity. DiMeo and Gruby identified Petitioner as one of the participants; however, both witnesses' identifications were profoundly suspect. First, during the trial and despite a sequestration order, DiMeo, accompanied by a detective, saw Petitioner in the hallway. Petitioner's counsel, Barry Denker, saw the detective point to Petitioner, who was in a group of men, and say to DiMeo, "that's the one." N.T. 4/15/75, 2, 3, 13, 14.[1] Denker immediately reported the incident to the trial judge. The judge questioned DiMeo and the detective, who denied pointing Petitioner out. The judge ruled that the Commonwealth had violated the sequestration order and noted that DiMeo and the detective contradicted each other in their testimony about the encounter in many respects. N.T. 4/16/75, 246. The judge further ruled that Denker could testify as a witness to the suggestive hallway encounter at trial if DiMeo made an in-court identification. N.T. 4/15/75, 19; 4/16/75, 246. The prosecutor, therefore, decided not to attempt to elicit an in-court identification from DiMeo. N.T. 4/16/75, 249-257. Instead, DiMeo testified only as to her alleged photo array identification.

Next, the Commonwealth called Gruby to testify. Gruby, who had not seen the perpetrator since the incident, testified about his alleged photo array identification and then was asked if he saw the man in the courtroom. He responded positively, identifying a spectator, Michael O'Connor. NT. 17.65-.70, 17.78-.79, 17.82,17.88 (11/13/81).

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1. Transcripts from the state court proceedings are denoted "Notes of Testimony" and are cited as "N.T." followed by the date and the page number.

(O'Connor, another African-American man, was ten years older than Petitioner, five inches shorter, and looked nothing like Petitioner (Photographs admitted at PCRA hearing — P-1, photo of O'Connor and P-2-4, photos of Petitioner). The trial judge then intervened, telling Gruby that he had been "hurried" in his identification, asking him to look again, and asking everyone in the first two rows to stand up. Gruby then decided he had made a mistake and identified Petitioner. He explained his initial identification of O'Connor by noting that "there is similarity in people." N.T. 17.78-.79 (11/13/81).

There was no other testimony or evidence linking Petitioner to the crime. Petitioner was convicted of murder and arson and sentenced to life imprisonment.

The Pennsylvania Supreme Court reversed. The Court held that trial counsel had been ineffective for failing to object to the trial judge's improper questioning of a critical identification Commonwealth witness, Louis Gruby, and to the unduly suggestive identification of petitioner by Gruby that resulted. *Commonwealth v. Mims*, 392 A.2d 1290 (Pa. 1978).[2]

C. The Second Trial

Petitioner was retried in 1981 with a codefendant, Edward Sistrunk. Judge Sabo presided over the second jury trial. During jury selection, the prosecutor intentionally removed all African Americans from the jury; she exercised thirteen (13) peremptories, striking each and every African American, resulting in an all-white jury. In fact, the United States District

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2. Petitioner's motion to dismiss the charges on double jeopardy and due process grounds was denied on April 4, 1979, and affirmed by *per curiam* order of the Pennsylvania Supreme Court. *Commonwealth v. Mims*, 414 A.2d 350 (Pa. 1980). An application for federal habeas corpus relief to bar a second trial was also denied. (CA. 80-2832 (E.D. Pa. 1980)). A motion to suppress the identification testimony of DiMeo and Gruby was denied on March 14, 1979.

Court for the Eastern District of Pennsylvania so found when it granted Sistrunk's habeas petition.[3]

At trial, over defense objection, the trial judge ruled that DiMeo would be permitted to make an in-court identification of Petitioner for the first time, ten years after the incident, but Petitioner would *not* be permitted to present the testimony of Denker that DiMeo had been coached in her identification prior to the first trial.

Additionally, the Commonwealth's only other identification witness, Gruby, had died between the trials. At the second trial, the Commonwealth introduced selected portions of Gruby's testimony from the first trial, including his testimony concerning a photographic identification of Petitioner. *See* N.T. 9.169-9.216 (10/29/81). What the Commonwealth did *not* introduce was the portion of Gruby's trial testimony in which he identified Michael O'Connor as the perpetrator. When the defense sought to introduce that testimony, the trial judge ruled that it could only be admitted if the subsequent identification of Petitioner by Gruby at that trial — the very identification that had led to the reversal of Petitioner's first conviction — was also admitted.

When Petitioner pointed out that the subsequent identification was found unduly suggestive by the state supreme

3. Chief Magistrate Judge Richard A. Powers III, in an opinion adopted by U.S. District Judge Marvin Katz on September 5, 1995, unequivocally found on August 10, 1995, that petitioner's prosecutor deliberately used her peremptory challenges to strike all 13 Black and one Hispanic to successfully achieve her goal of having petitioner and his co-defendant, Edward Sistrunk, tried by an all white jury. *Sistrunk v. Vaughn*, 754 F. Supp. 447 (E.D. Pa. 1991). This finding was not disturbed or criticized by the Third Circuit when it reversed Sistrunk's grant of habeas relief on the grounds that "the district court was foreclosed from addressing Sistrunk's *Batson* claims, as are we," because Sistrunk failed to raise his *Batson* claims on his post-conviction appeal and because Sistrunk did not prove that his post-conviction appellate counsel's decision not to raise the issue on appeal was ineffective assistance. *Sistrunk v. Vaughn*, 96 F.3d 666, 673-74 (3d Cir. 1996).

court and was the basis for overruling his first conviction, the judge ruled that the testimony could be admitted, with the substitution of the prosecutor's name for the judge's in the transcript. The trial judged concluded that the substitution cured any harm in admitting the prior Gruby identification of Petitioner. Nor would the judge permit O'Connor himself to testify about the identification, concluding that the transcript — which was utterly silent as to O'Connor's appearance and dissimilarity to Petitioner — could speak for itself. App. 32a. Over objection, the defense accepted the arrangement rather than forego admitting the vital defense evidence of Gruby's identification of another individual.

The second trial of Petitioner was rife with the sort of prosecutorial misconduct reminiscent of the deep South during the segregation era. Perhaps the most blatant and egregious examples occurred when the prosecutor questioned Petitioner's alibi witnesses, all of whom, like Petitioner, were African-American and members of the Nation of Islam. The prosecutor repeatedly mocked and belittled established Black Muslim religious traditions in an attempt to portray them as illegitimate, deceptive, and even criminal.[4] For example, she equated the

4. *See* N.T.12.64-65 (prosecutor's questions of witness Lt. Clark regarding Black Muslim "garb" worn by women at one of the locations police allegedly went to find petitioner after date of crimes); N.T.12.65 (prosecutor's questions to witness as to whether black "Moslem (sic) garb" was hooded and covered a part of the body); N.T.13.74 (prosecutor's deliberate negative reference to Black Muslim defense witness Jeremiah Shabazz's previous use of an "Anglo-American" name); N.T.13.76; 13.98 (prosecutor's deliberate and repeated practice of first referring to witness Shabazz as "Mr. Pugh" and then "correcting herself" by calling him by his Black Muslim name "Mr. Shabazz"); N.T.13.83 (prosecutor's reference to witness Shabazz's Black Muslim religious counsel to petitioner); N.T.13.84 (prosecutor's suggestive questions to Black Muslim defense witness as to whether Chicago Black Muslim temple destroyed records in response to police investigation); N.T.13.88 (prosecutor's negative reference to Ronald Boelter, who was

(Cont'd)

(Cont'd)
convicted for the crimes arising from the Dubrow Furniture Store incident in a prior separate trial, as someone who "stands around on the street corners . . . sell[ing] the 'Muhammad Speaks,'" a well-known Black Muslim newspaper); N.T.13.95 (prosecutor's deliberate reference to Shabazz as petitioner's Black Muslim "brother"); N.T.13.133 (prosecutor's negative reference to black defense witness Hamid Abduh's name change from Christian to Black Muslim); N.T.13.136 (prosecutor's negative characterization of the change in religious leadership at the Chicago Black Muslim temple as a "takeover"); N.T.13.137 (prosecutor's repeated characterization of Black Muslim leadership change as a "takeover"); N.T.13.138 (prosecutor's negative reference to Black Muslim defense witness Abduh's prior name Lassiter); N.T.13.157 (prosecutor's negative reference to Black Muslim defense witness' change to an Muslim name); N.T.13.179 (prosecutor's suggestion that police repeatedly came to Black Muslim defense witness Schuler's house to arrest him); N.T.14.47 (prosecutor's questions of Black Muslim defense witness Omar Karim about his name change); N.T.14.65 (prosecutor's questions Black Muslim defense witness Portia Pasha about her name change); N.T.14.152 (prosecutor's questions of Black Muslim defense witness Abass Rassoull concerning name change); N.T.18.112 (prosecutor's questions of Black Muslim defense witness suggesting that police had difficulty obtaining entry into a Black Muslim mosque); N.T.18.113 (prosecutor's questions concerning FBI's discussion with the mosque regarding its security arrangements); N.T.18.121 (prosecutor's questions concerning photograph of petitioner on mosque steps); N.T.18.156 (prosecutor's question to detective concerning whether Black Muslim co-defendant Sistrunk discussed his Black Muslim religious beliefs); N.T.19.6 (prosecutor's question to Mr. Shabazz whether the Black Muslim mosque kept congregation to a minimum because of exposure to law enforcement); N.T.19.7 (prosecutor's question to Black Muslim defense witness implying that Black Muslim mosque was being harassed by police because it was hiding fugitives); N.T.19.35 (characterizing in closing argument the alleged eight Black Muslim perpetrators as a "gang"); N.T.19.176 (arguing in closing argument that the murder victim was "happy" with his Anglo-American name).

Black Muslim religious practice of adopting Muslim names to that of criminals changing their names to conceal their identity and evade detection by law enforcement.[5]

In one particularly belittling exchange, the prosecutor (who well knew that Black Muslims refer to their former Christian names as "slave names") relentlessly harassed defense witness Abass Rassoull for his adoption of a Muslim name:

> Q [MS. CHRISTIE]: All right, Mr. Rassoull, your Anglo-American name, is that either Ed Clarence, or Clarence Benjamin Byrd, B-Y-R-D?
>
> A [MR. RASSOULL]: My name is — my slave name is Clarence Benjamin Byrd, correct.
>
> Q: Your slave name is Clarence Benjamin Byrd?
>
> A: The name you asked about — are you speaking of the name that was mine before I received the name Abass Rassoull?
>
> Q: I am speaking of your Anglo-American name, the name you received at birth form your non-slave parents, I assume?
>
> A: They were slaves mentally.
>
> Q: Your parents were slaves mentally?
>
> A: Mentally, yes. The name was Byrd.
>
> Q: I see. With regard to your parents, Mr. Byrd, Mr. Byrd and Mrs. Byrd, your mother and father —

---

5. The long-standing Muslim practice of adopting an Muslim name by those who follow the mandates of the Qur'an and the teachings of the prophet Muhammud is an act of ridding oneself of a name historically used to identify a slave as the property of a slave master and is also an act of defining one's spiritual aspiration and connection to God.

A: Yes.

Q: Are you telling this jury that your mother and father were slaves?

A: Mentally, yes, ma'am.

Q: Mentally they were slaves?

A: Yes, ma'am.

Q: I guess the same would apply to Dr. Martin Luther King?

A: Yes, ma'am.

Q: Thomas Bradley?

A: Yes, ma'am.

Q: Andrew Young of the United Nations?

A: Yes, ma'am.

N.T. 14.152-153.

This outrageous and offensive line of questioning served no legitimate purpose whatsoever — it was simply an excuse to denigrate the witness and the Petitioner for their religious beliefs, which stood in stark contrast to those of the white jurors.

The prosecutor continued to mock Petitioner's religion when she emphasized repeatedly in closing arguments that the African-American murder victim and his wife were perfectly happy with the names their parents gave them. App. 59a. Again, her remarks did not advance any legitimate prosecution or theory. Instead, they were simply gratuitous appeals to the white jurors' racial and religious bigotry.

The prosecutor also patently attempted to fabricate testimony by the defense witness that Muslims do not believe

in following "the law" in her misunderstanding of the witness' use of the word "Allah":

> Q [MS. CHRISTIE]: Did I understand you to say that the members of the Nation of Islam must be believers in the law? Is that what your testimony was, Mr. Rassoull?
>
> A: No, I said Allah.
>
> Q: Allah?
>
> A: Allah.
>
> Q: Then they don't have to be believers in the law?
>
> A: You asked me —
>
> MR. LIPSCHITZ: I object, if your Honor, please. Just a moment.
>
> MS. CHRISTIE: I will withdraw the question, your Honor.

(N.T.14.162). The point was made.

Quite apart from her outrageous appeals to prejudice, the prosecutor's closing arguments featured a virtual checklist of constitutional error. The prosecutor criticized Petitioner for waiving his preliminary hearing and claimed it was a defense trick to avoid confrontation with identification witnesses (App. 51a), told the jury that the presumption of innocence is not for the guilty and urged them not to apply it to Petitioner (App. 53a-54a), argued that Petitioner put on a defense case only because the government's case was so strong (App. 52a-53a), and stated — falsely and without a shred of evidentiary support — that Gruby identified someone other than Petitioner only because Petitioner had purposely filled the courtroom with "clones" in an effort to fool Gruby (App. 55a-58a).

On November 19, 1981, Petitioner and his codefendant were convicted of first-degree murder and other charges. Post-verdict motions were denied, and on October 31, 1982, Judge Sabo sentenced Petitioner to life imprisonment on the murder charge and a consecutive sentence of 10-20 years imprisonment on arson and aggravated robbery charges. A timely direct appeal to the Superior Court was denied in an unreported memorandum opinion and order on December 14, 1984 (*Commonwealth v. Mims*, 490 A.2d 12 (Pa. Super. 1984)), and on September 30, 1985 the Pennsylvania Supreme Court denied a timely-filed petition for an allowance of appeal. At the second trial and for all direct appeal proceedings Petitioner was represented by the now-deceased Louis Lipschitz.[6]

In 1987 petitioner filed a petition in Philadelphia Common Pleas Court requesting post-conviction relief and the appointment of counsel. No action was taken by the court. On January 11, 1996, the first counseled post-conviction Pennsylvania Post Conviction Relief Act petition was filed by Leonard Sosnov, who also represented Mr. Mims on his appeal to the Superior Court and in the District Court. On February 3, 1997, a hearing was conducted before Judge Sabo, in which affidavits and other evidence of Petitioner were all admitted by stipulation. N.T. 2/3/97, 6-18. On June 26, 1997, Judge Sabo denied relief in an order with no accompanying opinion.

6. Edward Sistrunk was also sentenced to life imprisonment, as was a third defendant Ronald Becker, who was tried separately. Sistrunk was denied relief on appeal in the Pennsylvania courts; he was subsequently granted habeas corpus relief by a district court on a finding of a Batson (*Batson v. Kentucky*, 471 U.S. 1052), equal protection violation and counsel's ineffectiveness for failing to preserve the claim on appeal. The Third Circuit reversed, holding, without deciding the merits of the *Batson* claim, that counsel had not been ineffective for failing to pursue the *Batson* claim. The case was remanded for consideration of prosecutorial misconduct claims decided by the district court, *Sistrunk v. Vaughn*, 96 F.3d 666 (3d Cir. 1996). On remand, the federal district court denied Sistrunk habeas corpus relief on the prosecutorial misconduct claims. The Third Circuit granted a certificate of appealability, and the case is now pending, (CA. No. 99-1477).

A timely appeal of the denial of post-conviction relief was denied by the Pennsylvania Superior Court in an unreported opinion on January 25, 1999, and on September 23, 1999, the Pennsylvania Supreme Court denied a timely filed petition for allowance of appeal. Petitioner's post-conviction action was pending in the Pennsylvania courts from January 11, 1996, until it was concluded on September 23, 1999. The present habeas corpus action was timely filed within one year of September 23, 1999, after equitable tolling had concluded. *Swartz v. Meyers*, 204 F.3d 417 (3d Cir. 2000).

Petitioner then instituted this post-conviction relief proceeding, filing a habeas petition on May 22, 2000. On July 26, 2001, the District Court adopted the findings of the Magistrate Judge, denying Mr. Mims' habeas petition. Despite the grant of a certificate of appealability to Mr. Mims' codefendant, Sistrunk, on similar habeas corpus claims, the District Court *sua sponte* issued a denial of a Certificate of appealability without providing any explanation. Mr. Mims filed a notice of appeal on August 24, 2001. As related earlier, Mr. Mims' application for a certificate of appealability was denied by the Third Circuit and the petition for rehearing *en banc* was also denied. This petition followed.

D. Standard of Review of Denial of Certificate of Appealability

Under 28 U.S.C. § 2253 and Rule 22(b) of the Federal Rules of Appellate Procedure, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a habeas petitioner who wishes to appeal from a final order of a District Court must obtain a certificate of appealability ("COA") for each claim he wishes to present to the Court of Appeals. In *Slack v. McDaniel,* 120 S. Ct. 1595, 1603 (2000), this Court concluded that "[e]xcept for substituting the word 'constitutional' for the word 'federal,'" AEDPA's COA requirement is merely "a codification of 'the pre-AEDPA standard for granting a certificate of probable cause ("CPC"),

as announced in *Barefoot v. Estelle,*" 463 U.S. 880, 894 (1983). Thus, under AEDPA, the COA plays the same role as the pre-AEDPA CPC, which had long been required for petitioner appeals in habeas cases.

The purpose of the COA requirement is "to prevent frivolous appeals." *Barefoot,* 463 U.S. at 893. A COA must, therefore, be granted if any issue is "debatable among jurists of reason," "a court could resolve the issue[] [in a different manner]" or "the question[] [is] adequate to deserve encouragement to proceed further." *Id.* at 893 n.4. In ruling on a COA application, the Court should resolve any doubts "in favor of the petitioner." *Jones v. Warden*, 402 F.2d 776 (5th Cir. 1968); *accord Whitehead v. Johnson*, 157 F.3d 384, 386 (5th Cir. 1998).

REASONS FOR GRANTING THE PETITION

Fifteen years ago, Petitioner was convicted of murder — based *solely* on two fundamentally flawed, cross-racial eyewitness identifications[7] that occurred several years after the crime was committed — in a trial so pervasively infected by racial bias and constitutional error that it would never be permitted to stand today. The prosecutor's intentional racial discrimination and deeply offensive, outrageous remarks were calculated to inflame the prejudices of the all-white jury during a time of extraordinary racial fear and hostility in Philadelphia.

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7. Such testimony is notoriously unreliable, especially where, as here, the identifying witnesses are white, petitioner is African-American, and the jury is white; the trial takes place in a city rife with a then-recent history of racial and religious divisiveness and demagoguery (especially surrounding Black Muslims involved in the Nation of Islam); and the Commonwealth, as here, was represented by a prosecutor who eagerly and relentlessly appealed to racial and religious prejudice throughout the trial. *See, e.g.*, B. SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); and E.M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE (CIVIL LIBERTIES IN AMERICAN HISTORY) (1970).

The inevitable resulting conviction is a sad example of the injustice that results from the volatile mixture of racism, prosecutorial misconduct, and unreliable eyewitness identification. It is time, at long last, to correct that injustice.

The numerous individual reasons why the COA should have been granted are set forth below. This Court should keep in mind that the prosecutor purposefully sought to exclude African-American human beings from the jury, and then repeatedly sought to take advantage of the all-white jury by making remarks calculated to inflame their passions. The prosecutor's actions took place in a time and a city burdened by pervasive and virulent racial hostility. While each of the identified errors alone provides a basis for relief, their cumulative effect is such that Petitioner simply did not get anything resembling a fair trial, and his conviction is inherently unreliable.

I. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE TRIAL COURT UNCONSTITUTIONALLY PRECLUDED WITNESS TESTIMONY CONCERNING THE SUGGESTIVE NATURE OF THE IDENTIFICATIONS

Relevant evidence from a witness cannot be excluded simply because a court may think that another witness that the other side may have to offer in rebuttal is more believable on the point or that the witness is not believable. *Ballou v. Henri Studios. Inc.*, 656 F.2d 1147 (5th Cir. 1981); *Commonwealth v. Greene*, 366 A.2d 234, 237 (Pa. 1976). It is also well established constitutional law that relevant, material defense evidence may not be excluded at trial on this basis. *Rock v. Arkansas*, 483 U.S. 44 (1987); *Crane v. Kentucky*, 476 U.S. 683 (1986); *Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967). Because Mr. Mims was denied his right to offer relevant, material evidence to rebut the only prosecution evidence linking him to the crime, as explained further below, there was a sufficient

showing to grant the certificate of appealability that Mr. Mims' due process and compulsory process rights were denied.

A. The DiMeo Identification

At Petitioner's second trial, where the entire issue was identification, the Commonwealth had only the identification testimony of Audrey DiMeo, and the prior testimony of Louis Gruby, who had identified a completely different individual when asked to make an identification at the first trial. DiMeo's identification of Petitioner at the second trial in 1981, ten years after the incident, was her first in-person identification of Petitioner.

The defense was precluded from presenting the testimony of Barry Denker, Petitioner's former counsel, who would have testified that DiMeo, in violation of a sequestration order, had an in-person encounter with Petitioner prior to her identification of him at this 1981 trial. He would have testified that in 1975, while Petitioner stood with a group of men in a courtroom hallway, a detective with DiMeo pointed Petitioner out in the group and said, "That's the one."

The District Court, like the Pennsylvania Superior Court and apparently the Third Circuit, erroneously concluded that the issue was whether DiMeo's identification testimony should have been precluded, which would have required a defense showing of suggestiveness that would convince a court that her identification testimony was too unreliable to be admitted at trial. In fact, the constitutional question raised is the very different one of the preclusion of defense testimony after DiMeo's testimony was admitted. Distinct from a motion to suppress, there is no comparable burden at trial for the defense to have the constitutional right to present defense testimony to attack the reliability and accuracy of a trial witness offered by the Commonwealth. *Crane v. Kentucky*, 476 U.S. 683 (1986), not cited by the District Court, unanimously rejected the type of due process analysis employed by the court to reject the

meritorious constitutional claim presented here. *See also Manson v. Brathwaite*, 432 U.S. 98, 116 (1977).

It was clearly erroneous for the Superior Court to conclude, and the District Court and Third Circuit to uphold, that the courtroom hallway confrontation was not suggestive and then to hold that there was no constitutional error. It was for the jury to hear Denker's account and determine whether and how much the hallway confrontation would affect its evaluation of DiMeo's testimony.

Further, the first trial judge expressed doubts as to the credibility of DiMeo and the detective, and concluded that Denker would have a right to testify concerning the confrontation if DiMeo made an in-court identification. The findings of that judge, the only one to hear and observe the witnesses, are the ones entitled to deference. *See, e.g., Campbell v. Vaughn*, 209 F.3d 280, 287-88 (3d Cir. 2000). Because Petitioner, however, was unable to offer such evidence, he was denied rights guaranteed to him under the Fifth and Sixth Amendments.

B. The Gruby Identification

The defense was precluded from offering any evidence, including the testimony of O'Connor, concerning the circumstances of Gruby's identification of O'Connor as the perpetrator. The District Court concluded, and the Third Circuit apparently agreed, that there was no constitutional error because from the reading of the transcript "the circumstances of the identification were perfectly clear." App. 31a. This is clearly wrong. The jury at the second trial never saw what O'Connor looked like. O'Connor's testimony would have established that he is significantly younger, shorter, and different looking than Petitioner, and that any accurate, reliable identification witness would not have mistaken O'Connor for Petitioner. The exclusion of this material evidence unreasonably violated Petitioner's due process and compulsory process rights. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

II. THE PETITION SHOULD BE GRANTED BECAUSE THE TRIAL COURT UNCONSTITUTIONALLY CONDITIONED ADMISSION OF GRUBY'S IDENTIFICATION OF SOMEONE ELSE ON ADMISSION OF THE SUBSEQUENT IDENTIFICATION ALREADY FOUND TO BE UNDULY SUGGESTIVE

Petitioner's first conviction had been reversed by the state's highest court because the circumstances surrounding Gruby's in-court identification of Petitioner were unnecessarily suggestive. In addition, the Pennsylvania Supreme Court ruled that the identification had been obtained in violation of the effective assistance of counsel when counsel failed to object to the judicial questions and suggestiveness that produced an unnecessarily suggestive identification. *Commonwealth v. Mims*, 392 A.2d 1290 (Pa. 1978).

Astonishingly, the District Court concluded with the apparent agreement of the Third Circuit, that the constitutional error could be cured by admitting the offending identification, and by simply changing the names so that the unduly suggestive, leading directions previously given by the first trial judge appeared to have been given by the prosecutor. The most reasonable reading of the Pennsylvania Supreme Court opinion is that the Gruby identification of Petitioner would not have occurred except for the improper suggestive actions of the trial judge, and that the circumstances were so unfair that it was ineffective assistance for counsel not to object to them. Amending the transcript would not have changed what actually happened and how and why the Gruby identification of Petitioner was obtained at the first trial.

III. THE PETITION SHOULD BE GRANTED BECAUSE THE PROSECUTOR VIOLATED DUE PROCESS IN HER EXTENSIVE ARGUMENT THAT PETITIONER ARRANGED AN UNFAIR LINEUP OF CLONES TO FOOL THE IDENTIFICATION WITNESS

The prosecutor made extensive argument, in a theme returned to again and again and consuming several pages in her closing, that Gruby's in-court identification of someone else was due to Petitioner's purposeful attempt to fool Gruby with a 16 person "clone" lineup. She did so despite the fact that she knew it was false and there was not a shred of evidence to back up this claim. That baseless argument violated Petitioner's Due Process rights. The District Court found this claim to have been fairly presented, but erroneously rejected it on the merits. App. 55a-58a.

The District Court concluded that the prosecutor's remarks constituted a proper response in "emphasizing the circumstances under which Gruby misidentified." App. 57a. There are three problems with that conclusion. One, the lineup was court approved — there was no improper defense tactic. Two, the defense had been precluded from presenting the man identified, O'Connor, or any other witness to show whether the men in the court approved courtroom were similar or not to Mims or any other circumstances of the Gruby trial identification procedure. Three, *there was no evidentiary support at this trial for this closing argument on the critical issue of identification. See, e.g., Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000) (inaccurate comments suggesting defendant "somehow manipulated the judicial system for his own gain" violated Due Process); *United States v. Wilson*, 135 F.3d 291 (4th Cir. 1998) (due process violated by closing argument statement of prejudicial "fact" not supported by any record evidence).

The egregious misconduct on the critical issue of identification warrants granting this petition.[8]

IV. THIS PETITION SHOULD BE GRANTED BECAUSE THE PROSECUTOR'S EGREGIOUS MISCONDUCT VIOLATED DUE PROCESS

A. Misconduct During the Presentation of Evidence

During the presentation of evidence, the prosecutor continually harassed Petitioner's Black Muslim witnesses for adopting Muslim names (N.T. 14.152-153), and impermissibly referred to witnesses inadmissible prior arrests and displayed arrest photos in an effort to discredit them. She also implied that members of the Nation of Islam did not believe in following the law. App. 38a. She also repeatedly stated that Petitioner had been arrested in Chicago for the Dubrow's murder, which she knew to be false. App. 47a-49a. She commented on Petitioner's waiver of a preliminary hearing, claiming that Petitioner had waived in order to avoid confrontation with the Commonwealth's identification witnesses. App. 51a.

The District Court concluded that many of the prosecutorial misconduct claims during the presentation of evidence were procedurally defaulted. App. 37a-50a. That ruling is wrong as a matter of law and the Third Circuit should have granted the application for certificate of appealability on this point, as well as the other points in this petition. The District Court interpreted a ruling by the Superior Court on appeal from the denial of PCRA relief that an issue was previously litigated on direct appeal and will not be reviewed again as an "adequate and independent state" ground barring habeas relief. *E.g.*, App. 39a,

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8. The error was compounded by the persistent argument that the subsequent identification of Petitioner by Gruby was the only fair procedure. This was improper argument, and the District Court erred in concluding that the Pennsylvania Supreme Court did not hold that the identification procedure producing this identification was unnecessarily suggestive. *See Commonwealth v. Mims*, 392 A.2d 1290 (Pa. 1978).

53a-54a, 58a-59a, 60a-62a. This is incorrect — it is simply a state court determination that an issue will not be considered a second time in any form that has already been considered before. In fact, there is no obligation for federal habeas purposes that there even be an attempt to raise a claim on collateral PCRA review that has been addressed on direct appeal, and there can be no procedural default or failure to exhaust found for the complete failure at the PCRA stage to raise a previously litigated claim or the manner in which it is attempted to be raised. *E.g., Lambert v. Blackwell*, 134 F.3d 506, 519-20 (3d Cir. 1997); *People v. Fulcomer*, 882 F.2d 828, 829, n.1 (3d Cir. 1989).

The District Court also repeatedly found with respect to several claims an adequate and independent state ground procedural default, simply because the state court decided an issue on state grounds. *E.g.*, App. 47a. Again, that ruling was wrong as a matter of law. The "adequate and independent state ground" doctrine applies only when a state court has refused to hear Petitioner's claims because he failed to meet a state procedural requirement. The proper federal question in deciding whether there has been a procedural default is whether Petitioner fairly presented the federal claim to the state courts. Petitioner could not now go back to state court and raise any claims because of PCRA time bar limitations. 42 Pa. C.S. § 9545(b). *See, e.g., Lines v. Larkins*, 208 F.3d 153, 164 (3d Cir. 2000). "[C]laims must have been presented to the state courts; they need not have been considered or discussed by those courts." *Swanger v. Zimmerman*, 750 F.2d 291, 295 (3d Cir. 1984). *Smith v. Digmon*, 434 U.S. 332 (1978) (per curiam) (same).

On direct appeal, counsel argued that prosecutorial misconduct denied Petitioner a fair trial. Among his claims was the complaint that the prosecutor had prejudicially and improperly belittled the Black Muslim defense witnesses during their cross-examination, and suggested in her questions that these Muslims felt they need not follow the laws of the United States. *See* App. 38a-43a. Counsel also raised the claim(s) that

mug shots of defense witnesses were improperly displayed to the jury, and that there had been improper cross-examination of defense witness Schuler about prior arrests, and of defense witness Ali about hiding in the basement. The Superior Court on direct appeal considered and decided these issues involving alleged prosecutorial misconduct during the testimony of defense witnesses, and denied relief because it concluded that Petitioner had not been denied a fair trial. Pa. Super. 12/14/84, 4-23.

The federal claim was fairly presented on direct appeal on these prosecutorial misconduct denial of a fair trial claims because they were presented and analyzed in the same manner as a due process claim. Preservation may be accomplished without "citing book and verse on the federal constitution." *Picard v. Connor*, 404 U.S. 270, 278 (1971). *See* App. 55a, n.33. Under very similar circumstances, the Third Circuit itself has held that the jointly tried co-defendant, Sistrunk, preserved in state court his prosecutorial misconduct due process claims in this case. *Sistrunk v. McCullough*, No. 97-1538 (3d Cir. July 27, 1998).

As noted in the District Court's opinion, the claims concerning the prosecutor's statements and questions pertaining to Petitioner's arrest in Chicago (App. 47a-49a), his access to money and a Cadillac when arrested (App. 47a-49a), and his waiver of a preliminary hearing (App. 51a), were not raised on direct appeal. However, no procedural default of these claims should be found, and, if so it is excused because of an ineffective prejudicial failure of counsel to preserve these meritorious claims, and any others found meritorious, through trial and direct appeal.[9]

Although not altogether clear, it seems that part of the District Court's reason for finding a procedural default of some of these claims is that the argument raised on PCRA was a

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9. The same counsel represented Petitioner at the second trial and through direct appeal.

prosecutorial misconduct claim, while the Superior Court on PCRA appeal viewed the claim as more properly one concerning the admissibility of evidence. *See* App. 47a-49a, 51a. This could not be an adequate and independent state ground procedural default because in the Superior Court's 1984 opinion, and in many Pennsylvania Supreme Court cases, a prosecutorial misconduct claim has been recognized as the proper way to bring the claim. It is thus not a firmly established and clearly and consistently applied state rule which could support a finding of procedural default. *See, e.g., Doctor v. Walters*, 96 F.3d 675, 683 (3d Cir. 1996).

The District Court recognized that the claim involving the cross-examination of a Muslim defense witness was appropriately preserved. App. 39a, n.23. *See Picard v. Connor*, 404 U.S. 270, 277 (1977); *Fennell v. Goosby*, 630 F. Supp. 451, 455 (E.D. Pa. 1985). Yet it rejected Petitioner's claim despite case law holding that this kind of due process violation warrants habeas relief. *See, e.g., United States v. Cannon*, 88 F.3d 1495, 1502-03 (8th Cir. 1996) (reversible prosecutorial misconduct for prosecutor to argue that black defendants, tried in North Dakota, were bad outsiders). The harm was compounded during closing argument when the prosecutor told the jury more than once that the African-Americans homicide victim and his wife were happy with their names (like the jurors and the prominent Black Americans, but unlike the Black Muslim defense witnesses).

B. Misconduct During Closing Arguments

During closing arguments there was extensive unreasonable prosecutorial misconduct. First the prosecutor denigrated Petitioner for exercising his constitutional right to mount a defense. The prosecutor argued, "why put on a defense at all," and then answered her rhetorical question with a statement that in light of the strength of the Commonwealth identification witnesses, "the defense was in trouble." N.T. 19.168 (11/17/81). Next, the prosecutor also made

prejudicial, improper remarks concerning the presumption of innocence, which the District Court found to be acceptable (App. 54a, n.32), even though the Tenth Circuit has concluded that very similar remarks required the grant of habeas corpus relief because they denigrated a specific due process right. *Mahoney v. Wallman*, 917 F.2d 469, 471-73 (10th Cir. 1990); *see also Floyd v. Meachum*, 907 F.2d 347, 354 (2d Cir. 1990) (remarks undermined presumption of innocence). The District Court held that these claims were procedurally defaulted.[10]

During closing argument, with no conceivable possible permissible purpose, and with the clear intent to prejudice the jury against the Black Muslin defense witnesses who all changed their names, twice Ms. Christie told the jury that the black murder victim and his wife were happy with the names they got from their parents. As with the grossly improper cross-examination mocking the religion of the Black Muslim defense witnesses, the District Court concluded that these comments were proper. App. 59a, n.37. The District Court also found a procedural default even though it concluded that the issue was raised and decided on direct appeal. App. 58a-59a. As with the cross-examination claim, this Court should include that it was fairly presented and not defaulted for habeas purposes, or that ineffectiveness provides cause and prejudice for any procedural default.

Finally, the prosecutor implored the jurors repeatedly to imagine themselves as the victim of the crime, in an effort to get a verdict from the jury on the basis of the horror of the

10. On the merits, the District Court also rejected a claim that the prosecutor's comments concerning Petitioner's waiver of a preliminary hearing, implying that it was to avoid a confrontation with the identification witnesses, was a fair response. App. 54a-55a These remarks, N.T. 19.145-146 (11/17/81) were intertwined with the entire improper theme concerning the "clones" and Gruby's identification. The District Court's finding of a procedural default is incorrect because ineffective assistance of counsel excuses the default at trial and direct appeal, and the issue was timely raised at PCRA proceedings.

crime, rather than the doubtful evidence linking Petitioner to the commission of the crime. App. 60a-61a. Such arguments have been condemned because they are "directed to passion and prejudice rather than to an understanding of the facts and the law." *Lesko v. Lehman*, 925 F.2d 1527, 1545 (3d Cir. 1991), *quoting United States ex rel. Perry v. Mulligan*, 544 F.2d 674, 680 (3d Cir. 1976), *cert. denied*, 430 U.S. 972 (1977). The District Court found this claim to be procedurally defaulted because it was not raised by trial counsel on direct appeal. Again the court should have concluded that ineffective assistance of counsel provided cause and prejudice to excuse the procedural default.

V. THIS COURT SHOULD GRANT THE PETITION BECAUSE PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS WERE NOT PROCEDURALLY DEFAULTED

The District Court held that a procedural default of ineffective assistance of counsel claims occurred in state court because "the claims were either not raised nor fairly presented." App. 68a-69a. This conclusion was clearly erroneous. This Court has held that it is not the role of a federal court to decline to hear habeas claims when the state courts either did not bar consideration of the claims or find that they were inadequately presented. The "adequate and independent state grounds" doctrine "applies to bar federal habeas when a state a court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991).

The Superior Court decided on the merits that counsel was not ineffective for failing to properly preserve underlying issues concerning the trial court's refusal to permit defense evidence concerning the hallway confrontation between Petitioner and DiMeo and the defense evidence concerning the circumstances of the identification of O'Connor by Gruby. *See* N.T. 1/25/99, Pa. Super. 3-7. Therefore, the decision that these two ineffective

assistance claims relating to the preclusion of defense evidence are procedurally defaulted (App. 68a-69a) was clearly erroneous.

The filings in the District Court specifically alleged that the ineffective assistance claim concerning the preclusion of defense evidence about the hallway confrontation between Petitioner and DiMeo. Therefore it is clear that this claim, which was fairly presented to the state courts, was raised sufficiently in the District Court to preserve it for federal habeas review. Each underlying meritorious issue had specified in the pleadings (and discussed in the court's opinion), and counsel's ineffectiveness claims with respect to the underlying merits had also been specified. The District Court also erred in finding some ineffectiveness claims concerning prosecutorial misconduct procedurally defaulted because of a Superior Court finding on PCRA appeal that they were previously litigated. App. 70a-72a. A finding that an issue has been previously litigated to bar consideration of an ineffectiveness claim is not a state procedural default finding, and if it was, it could not provide an adequate and independent state ground to bar habeas review of the claim.

Petitioner should have his petition heard on the ineffectiveness claims not only because there was an unreasonable denial of his right to the effective assistance of counsel but also, independently, because the state courts employed an erroneous and overly burdensome standard for establishing ineffective assistance. The District Court's opinion erroneously concluded that the state court applied the correct ineffectiveness standard solely because it cited a single state case that did so, even though that case repeatedly and explicitly employed an incorrect and more burdensome test than that of *Strickland v. Washington*, 466 U.S. 668 (1984). App. 65a-66a. It also found that if the state court employed the wrong standard in evaluating the ineffectiveness claim, it was harmless error. App. 65a, n.39.

The ineffective assistance of counsel claims have not been procedurally defaulted and they provide an independent basis for relief. *See, e.g.*, *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *United States v. Manning*, 212 F.3d 835, 840 (3d Cir. 2000); *United States v. Cook*, 45 F.3d 385 (10th Cir. 1995). Further, this Petition should be granted because, in violation of *Strickland*, the Superior Court employed an incorrect and more burdensome ineffectiveness standard, and that 28 U.S.C. § 2254(d) and *Williams v. Taylor*, 529 U.S. 362 (2000), require that the petition be granted.

CONCLUSION

For the foregoing reasons, Petitioner, Robert Mims respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

JAMES E. MCCOLLUM, JR.
CARLA M. MATHERS
JAMES E. MCCOLLUM, JR.
& ASSOCIATES, P.C.
7309 Baltimore Ave.
Suite 117
College Park, MD 20740
(301) 864-6070

WILLIAM H. MURPHY, JR.
Counsel of Record
12 West Madison Street
Baltimore, MD 21201
(410) 539-6500

Counsel for Petitioner